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US Supreme Court backs use of controversial lethal injection drug

The justices ruled that a controversial sedative in executions by lethal injection does not violate the constitution



US Supreme Court backs the use of controversial lethal injection drug Photo: Alamy

By Peter Foster, Washington

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A controversial execution drug that was blamed for leaving a condemned man heaving and gasping for air for 10 minutes before he eventually died was cleared for use in American death chambers by a US Supreme Court ruling on Monday.

Anti-death penalty campaigners had claimed that using the drug – a sedative called Midazolam – was unconstitutional since it could have inflicted “cruel and unusual” punishment on the condemned, but the nine Supreme Court justices narrowly disagreed in a split 5-4 decision.

Concerns about the drug were raised after it was used in executions in Arizona, Ohio and Oklahoma in 2014 that failed to go off smoothly.

In Ohio a man who raped and strangled a pregnant woman in 1989, killing her unborn child, “struggled, made guttural noises, gasped for air and choked for about 10 minutes before succumbing,” according to a reporter from the local Columbus Dispatch newspaper who witnessed the death.

In another execution in Oklahoma April 2014 in which Midazolam was used as part of a cocktail of three drugs, Clayton Lockett, a convicted murderer, could be seen twisting on the gurney after death chamber staff failed to place the intravenous line properly.

The Supreme Court ruled, however, that the four Oklahoma death row inmates who bought the case had failed to prove that Midazolam was any more “cruel” than the available alternatives.

Amnesty International said that the decision had showed that the death penalty system in America was “broken beyond repair” and failed to resolve the broader outstanding questions about its flawed implementation.

“The death penalty is the ultimate violation of human rights. The Court’s decision today will not resolve the death penalty’s fundamental flaws, including the risk of executing a wrongfully convicted person,” said Steven Hawkins, the group’s US executive director.

In recent years US death penalty states have struggled to obtain death-penalty drugs after pharmaceutical companies withdrew two drugs – pentobarbital and sodium thiopental – that had previously been approved for use in executions by a 2008 Supreme Court finding.

Justice Samuel Alito, writing for the conservative majority, said claims that Midazolam could not be used effectively in executions were “speculative” and that the inmates – one of whom has since been executed – had failed to prove beyond doubt its use would entail “a substantial risk of severe pain”.

But the majority decision produced unusually heated dissenting opinions from four liberal justices, two of whom argued that the death penalty represented “cruel and unusual punishment” howsoever it was administered, and should be declared unconstitutional.

Justice Stephen Breyer said it was time to debate whether the death penalty should be ended entirely, arguing that “most places” in the United States had already “abandoned” its use as unwieldy, and unsafe.

“Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose,” he wrote.

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today's administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty's penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited "cruel and unusual punishment." U. S. Const., Amdt. 8.



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Justice Sonia Sotomayor was even more emotive, writing that under the ruling "it would not matter whether the state intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake."

Shari Silberstein, executive director of Equal Justice USA, a pressure group, said the case had demonstrated a fundamental contradiction in efforts to create a workable death penalty system.

"As Justice Breyer pointed out in his dissent, you simply can't have a death penalty that is both fast and cheap and efficient and that tries to be fair and accurate and never gets the wrong person. The two things are fundamentally incompatible," she said.

A series of high-profile wrongful conviction cases, and the increasing cost of clearing the legal hurdles to execution now laid down by the US Supreme Court rulings means that 35 US states now have either banned executions or have an effective moratorium in place.

In a sign of changing times, last month the Midwestern state of Nebraska became the first conservative state in more than 40 years to vote to shut down its death row, driven primarily by considerations of cost and practicality.

Diann Rust-Tierney, executive director of the National Coalition to Abolish the Death Penalty, said the decision was clearly at odds with the prevailing national mood on the issue. "It's hard to imagine what could be crueler than a prolonged, torturous death, or more unusual," she said.

Support for the death penalty has dropped from 80 per cent 20 years ago, to 56 per cent today according to a survey by the Pew Research Centre in April, but even that apparently still-healthy support is less solid than it first appears.

When pollsters offer the alternative of life without parole, only 42 per cent of Americans prefer the death penalty, with 52 per cent against, according to a recent ABC News/Washington Post poll.